STATEMENT OF THE INTERTRIBAL MONITORING ASSOCIATION
(An Unincorporated Association of Fifty-Three Federally-Recognized Tribes Dedicated to Effective Indian Trust Accounting and Reform)
BEFORE THE SENATE SELECT COMMITTEE ON INDIAN AFFAIRS, SENATE, CONGRESS OF THE UNITED STATES, 107TH CONGRESS

February 7, 2002

Mr. Chairman, Mr. Vice Chairman, and members of the Committee, this written testimony is submitted to supplement the oral testimony given on behalf of the InterTribal Monitoring Association on Indian Trust Funds by Charles Tillman, Chairman of the ITMA Board of Directors and Chief of the Osage Tribal Council. ITMA is an unincorporated association of fifty-three federally recognized Indian tribes committed to monitoring the Indian trust fund and asset management and reform efforts of the United States Department of the Interior. The Association was formed in 1990 to provide a coherent voice from Indian country on Indian trust issues and to inform its member tribes of developments and setbacks in the attempts to reform a deficient system.

The dilemma faced by tribes today was created by the issuance of reports to each tribe by Arthur Andersen LLP in 1996 purporting to "reconcile" tribal trust accounts for the fiscal years 1973-1992. For the reasons stated below, those reports cannot be considered adequate accountings, as required by law, of the beneficiaries' trusts by their trustee, the United States. And yet, tribes are justifiably concerned that the Department of Justice would raise a statute of limitations defense based on the issuance of those reports. Given that the six-year statute of limitations would run this year if such an argument by Justice were accepted, tribes must either file suit now or risk that a remedy might be unavailable in the federal courts. As discussed below, it is neither in the interest of tribes or the United States to force tribes to file suit at this time.

The Association will not belabor the tortured history of the United States' mismanagement of tribal trust funds and resources. The Committee is well aware that the Department of the Interior has failed its Indian beneficiaries for decades by mismanaging their land, their natural resources, and their funds. As a House committee concluded in 1992:

> [s]cores of reports over the years by the Interior Department's inspector general, the U.S. General Accounting Office, the Office of Management and Budget, and

> others have documented significant, habitual problems in BIA's ability to fully and accurately account for trust fund moneys, to properly discharge its fiduciary responsibilities, and to prudently manage the trust funds.

"Misplaced Trust: The BIA's Mismanagement of the Indian Trust Fund," H.R. Rep. 102-499, at 2 (1992). The House Committee further resoundingly condemned BIA's ongoing obdurate refusal to implement the needed reform:

> The committee is particularly troubled by BIA's efforts—undertaken only grudgingly—to implement repeated congressional directives designed to provide a full and accurate accounting of the individual and tribal account funds. . . . In short, the Bureau of Indian Affairs has repeatedly failed to take resolute corrective action to reform its longstanding financial management problems. . . . The Bureau has repeatedly ignored directives to undertake needed management reform measures. . . As a result of this dismal history of inaction and incompetence, there is no assurance that the Bureau actually desires to, or will, make any substantial advancement toward rectifying the basic financial management failures brought to their attention.

Id. at 2-3, 5. The intervening nine years have proven the House committee to be prophetic. We are no closer to a "full and accurate accounting" of the tribal trust than we were then.

The Arthur Andersen Reports

The directives mentioned in the House Report included numerous mandates from Congress that the BIA and the Department provide tribes with an accurate accounting of their trust funds and assets.[1] The current dilemma faced by tribes arises from the Department's response to those mandates. In 1991, the Department contracted with Arthur Andersen LLP to conduct a so-called "reconciliation" of tribal trust accounts. The original charge to Arthur Andersen was that it was to "reconcile[the accounts] as accurately as possible back to the earliest date practicable, using available accounting records and transaction data." After five years, roughly $20 million in fees, and thirty-one contract modifications, Andersen submitted a report to each tribe regarding it purported trust fund balances.

The Andersen project was fatally flawed for a number of reasons. Andersen itself acknowledged the deficiencies in each report. It stated that each report did "not constitute an

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[1] *See* Act of December 22, 1987, Pub. L. No. 100-202 and Act of September 27, 1988, Pub. L. No. 100-446 (requiring the Bureau of Indian Affairs ("BIA") to audit and reconcile tribal trust funds, and to provide tribes with an accounting of such funds; Act of October 23, 1989, Pub. L. No. 101-121, Act of November 5, 1990, Pub. L. No. 101-512, and Act of November 13, 1991, Pub. L. No. 102-154 (requiring the BIA to audit, reconcile, and certify through an independent party the results of the reconciliation of tribal trust funds as the most complete reconciliation of such funds possible, and to provide tribes with an accounting of such funds).

audit made in accordance with generally accepted auditing standards." Therefore, Andersen did not express an opinion on the accuracy of any of its findings. As Andersen stated in each report:

> The Congressional mandate for the Bureau Tribal Trust Funds Reconciliation Project (Reconciliation Project) ***requires an accounting*** to each Tribe for each of their Trust accounts. The primary objective of the Reconciliation Project, as stated in the Contract, is to reconstruct historical transactions, to the extent practicable, for all years for which records are available for all Tribal Trust accounts managed by the Bureau. Phase I of the Reconciliation Project substantiated that ***not all records would be available for a full accounting*** of such funds. Due to the unavailability of some records, the scope of the Reconciliation Project is designed to ***provide reasonable assurance*** as to the accuracy of each Tribal Trust account balance. The agreed-upon procedures performed, as required by the Contract, represent the Bureau's standard of reasonableness.

(Emphasis added.) Most tribes agree that the reconciliation project did not provide any "reasonable assurance" regarding their account balances, in part for the reasons summarized below. But this statement by Andersen is particularly relevant to the issue currently before the Committee because Andersen concedes expressly that, although Congress required an accounting, a full accounting was not possible. Instead, the Bureau substituted its own "standard of reasonableness" for the accounting required by Congress and by trust law.

Many of the reports' deficiencies are obvious from the "agreed-upon procedures" that guided Andersen's work.[2] Only a few of the deficiencies are discussed here to give the Committee some understanding of the incomplete nature of the project and to underscore the fact that the reports cannot be considered an accounting that would trigger the statute of limitations for tribal claims.

Because of the limited availability of electronic data, Andersen only looked at records from 1972 forward. Losses to the tribal trust prior to that date were not analyzed in any way. This means that there is simply no way to know whether the beginning balance used by Andersen bears any resemblance to the amount that should have been in any given tribal account in 1972.

Another significant deficiency involves investment of tribal trust funds. Andersen (with the consent of the Department) did little substantive analysis of the investment of each tribe's trust funds. Instead, Andersen conducted an "Interest Yield Analysis" for each tribe. This "agreed-upon" procedure involved calculating each tribe's investment yield for each year. Andersen then derived a "benchmark rate" for all tribes based on the total return for all tribes in any given year. If the investment return on a given tribal account was within two percent below or five percent above the so-called benchmark, Andersen did nothing else.

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[2] Of course, only the Department and Andersen "agreed upon" those procedures. The beneficiaries had no role in determining how their trust funds and assets would be analyzed.

Several flaws in this procedure are worth highlighting. First, the "benchmark" rate was derived not from some external source but from tribal trust accounts themselves. Thus, systemic problems in trust fund management could not be identified because they were simply included in the average against which individual tribal accounts were measured. If better returns were available generally (either through different investment strategies or through better procedures), Andersen's procedure could not have identified the losses. Second, the margin of deviation allowed by Andersen from that flawed benchmark is considerable. A tribe that consistently received almost two percent less than the benchmark would have earned less than two-thirds of the interest over a twenty-year period that a tribe that received the benchmark return each year would have earned.

Perhaps the most egregious failing in the Andersen project was that Andersen was not charged with analyzing the Department's management of the underlying trust assets that generate the majority of trust funds in the first place. Without attention to the underlying trust assets, there can be no analysis of what the true balances should be. For example, natural gas producers leasing Indian lands have routinely underreported their production of gas from leased Indian lands by 20 to 40 percent, but the MMS has only recently (and even then sporadically) begun auditing production with any degree of care. Mismanagement of other trust resources has resulted in similar losses. And yet, with the exception of five "Fill-the-Gap" tribes, no attempt was made to sure that adequate rents, royalties, and other income was being collected in exchange for use or purchase of tribal resources.

For these reasons, and others too detailed to explore here, it would be dishonorable and legally impermissible for the United States to construe the Arthur Andersen reports as fulfilling its legal obligation to the tribes to account for tribal trust funds and assets.

The Annual Appropriations Language

Congress has recognized the legal interrelationship between an accounting and the statute of limitations. In each Interior appropriations act passed since 1990, Congress has stated in this or similar language, "notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with the accounting of such funds." *See, e.g.*, Pub. L. 101-512, 104 Stat. 1915, 1930 (1990).

ITMA believes that this language, which has appeared unchanged before and after issuance of the Andersen reports, would assist tribes in defeating any statute of limitations defense raised by the Department of Justice. But tribal leaders cannot be expected to risk the claims of their tribes based on language that does not make it clear that the Andersen reports were not the "accounting" Congress directed and that has been mentioned in each appropriations bill.

The Importance of Trust "Resources" or "Assets"

The importance of tribal trust resources, or assets, was mentioned in the discussion of the Andersen report above. ITMA wishes to stress the importance of mismanagement of those underlying resources to the Committee. If the goal of Congress and the United States is to make tribes whole for the losses tribes have suffered because of breaches of trust by the Department, mismanagement of the underlying land, minerals, oil, gas, timber, and other resources ***must*** be examined and quantified. If tribes (and individual Indians) are not able to recover for that mismanagement, whether through a comprehensive settlement or tribe-by-tribe litigation, one of the greatest thefts in history will have been countenanced by the United States.

Time after time, tribes have litigated and won substantial judgments or settlements because of the United States' failure to fulfill its duties as trustee of Indian lands. For example, in *Confederated Tribes of the Warm Springs Reservation v. United States*, 248 F.3d 1365, 1371, 1375 (Fed. Cir. 2001), the Federal Circuit required a determination of damages regarding several categories of BIA's failure to manage tribal timber resources in a manner that obtained the greatest appropriate revenue for the tribal beneficiaries. In *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1331 (10th Cir. 1982), the Tenth Circuit found that the Secretary of the Interior did not even intend to comply with the regulatory notice requirements for offering tribal mineral leases, and indeed failed to comply with those requirements. Just four years later, the Tenth Circuit held that the Department had again breached its fiduciary duties to the same tribe by failing to correctly interpret the royalty terms in leases and regulations, by failing to ensure that lessees complied with lease terms, and by failing to insure the protection of leased lands. *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1565 (10th Cir. 1984) (Seymour, J. concurring & dissenting), *adopted as majority opinion as modified*, 782 F.2d 855 (1986) (en banc), *supplemented*, 793 F.2d 1171 (1986), *cert. denied*, 479 U.S. 970 (1986).

The Tenth Circuit also has found that the Secretary "uncontrovertedly" breached trust duties to a tribe by failing to examine all relevant factors before approving a communitization agreement for mineral development. *See Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583, 590 (10th Cir. 1992), *cert. denied*, 507 U.S. 1003 (1993). More recently, the Federal Circuit flatly rejected the government's contention that a balancing of national interests excuses the Secretary's flagrant breach of fiduciary duties by suppressing and concealing an administrative appeal decision to favor a mineral lessee to the detriment of the relevant tribe. *See Navajo Nation v. United States*, 263 F.2d 1325, 1332 (Fed. Cir. 2001).

Given the documented failure of the United States to fulfill its duties regarding management of tribal resources, any comprehensive settlement of the tribal trust debacle must include the damages arising from that mismanagement. If a settlement is not forthcoming, tribes must be able to litigate those issues. In the meantime, tribes should not be forced to file suit simply because of concerns relating to their resource claims and the statute of limitations.

The Need for Legislation

The Department of Justice is infamous in Indian Country for raising every possible defense to Indian claims in litigation. Whether considered dishonorable attempts to avoid the United States' fiduciary obligations or vigorous advocacy in defense of its client, those historical tactics lead to the very real concern that the government's lawyers will attempt to construe the

Arthur Andersen reports as accountings that would trigger the statute of limitations. If tribes are to avoid the cost and risk of litigating that issue, they must either file suit immediately or Congress must act.[3]

Because tribes should not be expected to shoulder the burden for the United States' failures and because a flood of litigation is in neither the tribes' nor the United States' interests, ITMA urges Congress to Act. Since the Andersen reports were issued, tribes (and Congress) have received a series of promises from the Department that the trust system would be reformed. Presumably, any reform would also include efforts to rectify the effects of past mismanagement. But as tribes have waited anxiously, each successive reform effort has stalled.

ITMA believes that a comprehensive settlement would be in the best interests of tribes and the United States. But thus far, the Department has failed to show any willingness to develop a process that could lead to such a settlement. Regardless, it seems certain that no meaningful settlement could be reached in a matter of months–the necessary analysis (probably including modeling) would require a significantly longer period. If tribes are to continue to wait for a tenable settlement plan, they must be assured that they are not foregoing their rights in court in the meantime.

Comments on S. 1857

ITMA is grateful for the support of the Vice Chairman, who introduced S. 1857 in the closing days of the last session in an attempt to resolve this problem; the Chairman, who co-sponsored that bill; and other members of both houses of Congress who have already recognized the importance of the issue before the Committee. It is hoped that today's hearing will lead to the passage of legislation that will resolve the Hobbesian choice faced by tribes.

With the qualifications discussed below, ITMA supports S. 1857 as currently drafted. It would provide tribes with some additional months in which to file suit or to secure the passage of additional legislation further extending the statute of limitations. If S. 1857 is to go forward in its current form, however, ITMA believes that the legislation would be much more effective if Section 1(a) were amended to read:

> (a) IN GENERAL.—Solely for purposes of providing an opportunity to explore the settlement of tribal claims, during fiscal year 2002, the statute of limitations shall be deemed not to have run for any claim concerning losses to or mismanagement of tribal trust funds **and resources. Further, with regard to the reconciliation reports distributed to tribes by Arthur Andersen and the Department of the Interior in 1996:**

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[3] There is some uncertainty as to precisely what date might be regarded as beginning the running of the statute of limitations were the Andersen reports considered to be "accountings." Summary reports were issued in January 1996. More detailed reports were issued to at least some tribes in February 1996. Exit conferences with tribes were held throughout that year.

(i) Those reports shall not be considered to have started the running of the statute of limitations for any claim against the United States by an Indian tribe regarding the management of tribal trust funds and resources, regardless of when such claim is filed; and

(ii) Those reports shall not be considered for any purpose to be an accounting sufficient to fulfill the United States' duty to account as required by the American Indian Trust Fund Management Reform Act of 1994, under other applicable law, or under general principles of trust law.

(iii) The United States is precluded from introducing those reports into evidence, from using them as rebuttal evidence, or otherwise relying on them in any administrative or judicial proceeding to prove any purported conclusion or fact contained in those reports.

With such an amendment, ITMA would enthusiastically support passage of S. 1857.

Since the pressures of the final days of a session are no longer present, ITMA respectfully suggests that the Committee might also consider revisiting the basic goals of the legislation. If the Committee is willing to explore a more comprehensive solution to the current problem, ITMA would propose that an amended bill specifically include the following in addition to the amendments discussed above:

· Specific language stating that the statute of limitations defense shall be deemed not to have run for any claim concerning losses to or mismanagement of tribal trust funds and resources through the end of fiscal year 2007.

Comment: It would waste the resources of both Congress and the tribes to require annual legislation regarding the statute of limitations issue. Five years is a reasonable period for the Department, if it proceeds in good faith, to develop a fair settlement structure in conjunction with tribes. In the meantime, tribes should not have to be concerned that they will surrender legal rights by pursuing a good faith settlement. Note: tribal trust "resources" are included for the reasons stated above.

· Specific language mandating that the Department attempt in good faith to negotiate a full and fair settlement regarding losses resulting from mismanagement of tribal trust funds and resources by the end of fiscal year 2007.

Comment: Generally, see above. Tribes have seen no sincere attempt by the Department to develop a comprehensive settlement. Without a mandate from Congress to do so, it is very likely that ITMA will be before this Committee again in five years and that many tribes will be forced to file suit.

· Specific language creating a right to reasonable attorneys' fees and costs (including expert costs) for any successful tribal claim relating to mismanagement of trust funds and resources:

(1) in which judgment is entered after the end of fiscal year 2003, if suit was filed before the enactment of this legislation, or

(2) in all suits filed after the end of fiscal year 2007.

Comment: Such a provision would encourage timely resolution, hopefully through settlement, of such suits that are currently pending. It would also provide a strong incentive for the Department to comply with the mandate that a comprehensive settlement acceptable to tribes and to Congress be reached within a five year period by imposing a penalty, tribes' litigation costs, if tribes must ultimately litigate their claims. The two-tier structure is intended to discourage tribes from filing suit after enactment of this legislation and before the settlement period ends.

As laudable as S. 1857 is, now is the time for Congress to consider how the trust fund debacle can be resolved fairly and finally within a reasonable period of time. ITMA would welcome the opportunity to work with the Committee on an amendment, or separate legislation, incorporating these additional concepts.

Conclusion

The statute of limitations issue relating to the Andersen reports of vital importance to tribes, and ITMA is grateful for the opportunity to testify and to enter these written comments in the record. Whether the Committee opts for an interim measure or a bill intended to reach the broader issues of Indian trust reform and past mismanagement, ITMA urges the Committee to move forward to ensure that the dilemma faced by tribes does not force them into litigation unnecessarily.